IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

BOBBY WATERS, Plaintiff, v. MEL MILLER, Individually and d/b/a FAST ACTION AUTO TRANSPORT; PROGRESSIVE CASUALTY INSURANCE COMPANY; and PROGRESSIVE EXPRESS INSURANCE COMPANY, Defendants.	* * * * * * * * * * * * *	CASE NUMBER: 4:2006CV00129

PLAINTIFF'S MEMORANDUM OF LAW AND BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW the Plaintiff, Bobby Waters, by and through undersigned counsel, pursuant to Rule 56, Federal Rules of Civil Procedure, and files this his Response to Defendant's Motion for Summary Judgment showing this honorable Court as follows:

I. STATEMENT OF UNDISPUTED FACTS

Defendant Miller d/b/a Fast Action Auto Transport was an interstate motor carrier engaged in the transportation of motor vehicles. Defendant Miller was issued a commercial vehicle liability insurance policy by Progressive Express Insurance Company, which covered the tractor and trailer Mr. Miller used to transport automobiles. The Progressive policy, policy number 02565020, had a liability limit of $1,000,000.00 and covered the vehicles involved in the underlying collision between Mr. Waters and Defendant Mel Miller.

Of course, Progressive knew that it had issued a commercial policy of insurance to Defendant Miller insuring a tractor and trailer to be used to transport property. Progressive also knew during the pendency of the policy that Mr. Miller had other drivers that would be called upon to transport property via the insured tractor and trailer. Under the terms of the Progressive policy, Progressive specifically agreed to insure Mr. Miller's tractor and trailer anywhere he or the other authorized drivers may travel within a 300 mile radius of Keystone Heights, Florida.

Within this 300 mile radius, Mr. Miller could and did transport automobiles in the states of Florida, Georgia, Alabama, and South Carolina. Progressive calculated and charged Mr. Miller a premium based on its understanding that Mr. Miller would be allowed to transport goods anywhere within **any state** within this 300 mile radius. In fact, the premium cost per dollar of coverage was higher under this policy than the policy Progressive subsequently issued "Fast Action Auto Transport, Inc." after his wreck with Bobby Waters, wherein he was transporting automobiles interstate.[1] This fact clearly demonstrates that Progressive calculated his premium for the policy at issue in an amount commiserate with that of a policy covering an interstate motor carrier.

Pursuant to Federal regulations, Mr. Miller was required and he did obtain a USDOT number and an apportioned tag allowing him to lawfully engage in interstate transportation in the states of Florida, Georgia, Alabama, and South Carolina. When Mr. Miller went to obtain his apportioned tag, he had Cline Insurance Agency, an authorized local agent of Progressive, to issue a Certificate of Insurance to the State of Florida, certifying that the Progressive policy provided liability coverage for his transportation of automobiles within a 300 mile radius of Keystone Heights, Florida. Progressive had previously communicated with the State of Florida regarding Mr. Miller's policy in December 2004, where it notified the State of its initial intent to cancel Mr. Miller's policy and its subsequent intent to reinstate Mr. Miller's policy with an effective date of December 28, 2004.

On November 3, 2005, Mr. Miller was in the process of transporting a vehicle and received a speeding violation in or around Tifton, Georgia. Progressive was made aware of this moving violation in another state and, thus, certainly made it clear that Mr. Miller engaged in interstate travel as part of his automobile transportation business as he was permitted to do under his policy.

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[1] Mr. Miller's annual premium under the policy at issue was $10,741.00 and provided for $1 million in liability coverage (a cost of $93.10 per dollar of coverage). The subsequent Progressive policy issued to "Fast Action Auto Transport, Inc." had an annual premium of $9,336.00 (a cost of $80.33 per dollar of coverage).

On November 29, 2005, Defendant Miller rear-ended Mr. Waters on Interstate 185 in Columbus, Georgia, while Mr. Miller was enroute to deliver a trailer of automobiles to a location in Columbus, Georgia, which was within the 300 mile radius authorized under the Progressive policy. As a result of the collision, Mr. Waters suffered severe injuries, including an injury to his back which has required surgery.

II. MEMORANDUM OF LAW

A. The Unrefuted Evidence in This Case Makes Clear That Progressive Knew Mr. Miller was Engaged in Interstate Travel and Progressive Calculated Mr. Miller's Premium Accordingly.

Without any supporting evidence, Progressive alleges in its Motion for Summary Judgment that it was somehow never made aware of the fact that Mr. Miller was engaged in interstate travel. [See Docket #41, pp. 7, 12]. As the facts above clearly demonstrate, Progressive not only issued Mr. Miller a commercial insurance policy that specifically allowed for him to engage in interstate travel up to a 300 mile radius of Keystone Heights, Florida (i.e., in the states of Florida, Georgia, Alabama, and South Carolina), it actually charged him a premium commiserate with what it charges interstate motor carriers. Accordingly, Progressive admitted through its 30(b)(6) witness that it knew that Mr. Miller certainly could engage in interstate travel under his policy.

In addition, Progressive's local agent, Cline Insurance Agency, submitted a certificate of insurance to the State of Florida in April 2005 in order for Mr. Miller to be able to obtain his apportioned tag, allowing him to lawfully engage in interstate transportation in the states of

Florida, Georgia, Alabama, and South Carolina (the same states he was specifically allowed to travel in pursuant to the terms of Progressive's policy). As was already known to Progressive, the certificate also clearly certified that Mr. Miller had a policy of insurance with Progressive that would cover his tractor and trailer, which was to be used in the transportation of automobiles anywhere within a radius of 300 miles of Keystone Heights, Florida. Moreover, as reflected in the comparison of premiums between Mr. Miller's initial policy and the subsequent policy issued to Mr. Miller on behalf of "Fast Action Auto Transport, Inc.", it is clear that Mr. Miller's premiums were at a level commiserate with the customary charge of an interstate motor carrier.

Lastly, it is undisputed that Mr. Miller was an interstate motor carrier engaged in the transportation of motor vehicles and that he was registered to operate in the states of Florida, Georgia, Alabama, and South Carolina. Accordingly, it is clear that the Federal Regulations at issue specifically applied to Mr. Miller and the commercial insurance policy issued by Progressive.

B. The Federal Laws at Issue Are Specifically Designed to Protect Members of the Public, like Bobby Waters, Who Have Been Injured by Negligent "Fly by Night" Motor Carriers, Like Mel Miller, by Ensuring Funds Are Available to Compensate Them For the Injuries They Have Suffered.

The entire purpose behind the Federal Regulations at issue is to protect members of the public, like Bobby Waters, who are injured as a result of the negligence of a motor carrier. These regulations are specifically designed to ensure a financially responsible entity will be available to compensate victims of motor carrier negligence. By way of this regulatory scheme, it is clear that the balance has been struck in favor of compensating the innocent member of the public who is injured by a motor carrier over the particular financial interests of any motor carrier or its insurer.

The history of this regulatory scheme at issue reveals that Congress enacted the Motor Carrier Act, in part, to address abuses that had arisen in the interstate trucking industry which threatened public safety, including situations, as here, where larger corporations were using leased or hired vehicles to avoid financial responsibility for accidents that occurred while goods were being transported in interstate commerce. *See e.g.*, *Canal Ins. Co. v. Distribution Services, Inc.*, 320 F.3d 488, 489 (4th Cir. 2003).[2] One of the primary ways the Motor Carrier Act accomplishes this goal is "a liability insurance requirement imposed upon each motor carrier registered to engage in interstate commerce, which requirement mandates that a motor carrier file 'a bond, insurance policy, or other type of security' in an amount determined by the Secretary of Transportation and the laws of the State or States in which the motor carrier intends to operate." Id. (citing 49 U.S.C. § 13906(f)).

Under this regulatory scheme, the Secretary of Transportation also has the authority to "prescribe the appropriate form of endorsement to be appended to policies of insurance and surety bonds which will subject the insurance policy or surety bond to the full security limits of the" required coverage. 49 U.S.C. § 13906(f). "Pursuant to this regulatory authority, the Secretary of Transportation issued a regulation ***mandating that every liability insurance policy covering a 'motor carrier' contain the MCS-90 endorsement.***" *Canal Ins. Co.*, 320 F.3d at 489 (citing 49 C.F.R. §§ 387.7(a), 387.9, 387.15)(emphasis added). "***Thus, insurance companies who insure vehicles owned or leased by interstate trucking companies must include this endorsement in the policy***." *Kolencik v. Progressive Preferred Ins. Co.*, 2006 WL 738715, *3 (N.D. Ga. 2006).

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[2] In this case, Defendant Miller was hired to transport automobiles for the benefit of Budget.

The endorsement that must be included by insurance companies in their policies insuring interstate motor carriers is known as the MCS-90 endorsement. Pursuant to the standardized language of the endorsement, "the insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Sections 29 and 30 of the Motor Carrier Act of 1980." 49 C.F.R. § 387.15. The endorsement goes on to state no limitation in the policy or "violation" of the insurance agreement by the insured shall relieve the company from liability or from payment of any final judgment regardless of the financial condition of the motor carrier. *Id; see also, Fireman's Fund Ins. Co. v. Empire Fire & Marine Ins. Co.*, 152 F.Supp.2d 687, 690-691 (E.D.Pa. 2001) The endorsement, however, preserves any limitations in the policy as binding between the insured and the insurer, and it specifically contains a provision mandating that the insured reimburse the insurance company for any payments made that the company would not have been obligated to make under the provisions of the policy except for the agreement contained in the endorsement. *Id.*

As such, the MCS-90 clearly expands the coverage provided by the underlying insurance policy beyond the actual terms or limitations set forth in the policy. The MCS-90 endorsement is mandated by Federal law for the protection of the general public, while at the same time it preserves an insurance company's ability to enforce the limitations of its policy with the actual insured. The regulatory scheme, thereby, makes the compensation of injured victims its primary goal by making the insurance company act as a suretyship for the protection of the public. *See e.g., Canal Ins. Co. v. Carolina Cas. Ins. Co.,* 59 F.3d 281, 283 (1st Cir. 1995)("[W]e consider the [Form MCS-90 type] endorsement to be . . . a suretyship by the insurance carrier to protect the public . . . "). Once this goal has been accomplished, an insurance company is allowed to seek financial redress from its insured based on the terms of the specific policy.

Courts have often reiterated that "[t]he policy embodied in these regulations 'was to assure that injured members of the public would be able to obtain judgments collectible against negligent authorized carriers." *Kolenick* at *3. *(quoting T.H.E. Ins. Co. v. Larsen Intermodal*, 242 F.3d 667, 672 (5th Cir. 2001).[3] As such, "[i]t is well-established that the primary purpose of the MCS-90 [endorsement] is to assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers." *John Deere Ins. Co. v. Nueva*, 229 F.3d 853, 857 (9th Cir. 200), *cert. denied*, 534 U.S. 1127 (2002). In essence, the MCS-90 endorsement creates a suretyship by the insurer to protect the public when the insurance policy to which the MCS-90 endorsement is attached otherwise provides no coverage to the insured. *T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc.,* 242 F.3d 667, 672 (5th Cir. 2001).

For example, as the terms of the MCS-90 endorsement specifically state, a policy of insurance insuring a motor carrier will by operation of the endorsement be found to cover motor vehicles that are not specifically listed as insured vehicles in the policy; motor vehicles that may be traveling outside of any geographical limitations placed on a motor carrier by the policy; and even motor carriers who may have violated specific provisions of the policy or otherwise be subject to some exclusion under the policy. 49 C.F.R. § 387.15, at Illustration I.

Another method by which the MCS-90 endorsement serves "to assure that injured members of the public are able to obtain judgment[s] from negligent authorized interstate carriers," is by requiring notice be given if an insurance company wishes to cancel its obligations under the mandated MCS-90 endorsement. Specifically, under 49 C.F.R. § 387.15, it is clear that the MCS-90 endorsement "will remain in effect continuously until terminated, as required by § 387.7 of this subpart." A MCS-90 endorsement can only be cancelled or terminated by providing notice to the FMCSA, at its office in Washington, D.C., with such cancellation or termination only taking effect 30 days after the FMCSA receives notice of such cancellation. *Northland Ins. Co. v. New Hampshire Ins. Co.*, 63 F.Supp.2d 128, 134 (D.N.H. 1999). Of course, the purpose of this notice requirement is to allow sufficient time for the Secretary of Transportation to revoke the registration of the carrier after the effective date of the cancellation, thereby protecting the public by removing the carrier from the public roadway. 49 U.S.C. § 13906(e); *See e.g., Barbarula v. Canal Ins. Co.*, 353 F.Supp.2d 246 (D. Conn 2004).

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[3] "In sum, a legislative choice was made to extend the liability coverage of the insurance company through the Form E and MCS-90 filings in order to protect the innocent public from "fly-by-night" leasing operations." *Kolencik*, at *8.

In light of the foregoing authority, it is clear that the Progressive policy at issue, which covered an authorized interstate motor carrier, was required by Federal law to contain a MCS-90 endorsement, and that the mandatory inclusion of such endorsement was for the specific protection of the public, who may become injured as a result of the negligence of the motor carrier. The foregoing authority also makes clear that the only way such endorsement can be terminated is for proper notice to be given to both the insured and the FMCSA at its office in Washington, D.C. Such regulatory scheme insures the protection of members of the public, such as Bobby Waters, initially by mandating an endorsement exist for the protection of the public and secondly by insuring that the FMCSA will have the opportunity to revoke a carrier's registration if the endorsement is canceled, thereby removing the carrier from the road for the protection of the public.

C. Defendants' failure to follow the clear mandate and requirements of Federal Law Should Not Serve as a Defense or Nullify the Obligations Created By the Federal Law Specifically Designed to Protect Innocent Members of The Public.

In its Motion for Summary Judgement, Progressive asks this Court to relieve it of its obligations mandated by Federal law via the MCS-90 endorsement on the grounds that the Defendants never formally issued an MCS-90 endorsement in violation of Federal law. If Progressive's argument prevails, it would certainly create the perverse incentive on the part motor carriers and insurers, alike, to never issue a MCS-90 endorsement, thereby allowing them to escape the obligations and broad coverage provided by the endorsement for the protection of the public. If simply ignoring these regulations effectively immunizes motor carriers and their insurers from the obligations set forth by these regulations, then there would exist no reason to ever comply with these regulations, thereby thwarting the entire purpose of these regulations.

Contrary to Defendant's suggestion in its brief, no Court in this Circuit has ever addressed this issue. In its brief, Defendant contends that *Kennedy v. Georgia-Carolina Refuse and Waste Co., Inc.*, 739 F.Supp 604 (S.D. Ga. 1990) addressed the current issue before the Court. The issue in that case, however, was whether an insurer's alleged failure to investigate whether the defendant's drivers were qualified to drive a motor vehicle pursuant to the standards of the Federal Motor Carrier Safety Regulations constituted negligence under Georgia law and whether the insurer negligently inspected the driving history of Defendant's drivers under Georgia law. *Id.* at 606.

In rejecting plaintiff's arguments, the *Kennedy* court concluded that the qualification standards for drivers could not serve as the basis of a tort action against an insurer under Georgia law, where the standards at best only created a duty with respect to the owners and operators of motor carriers. *Id.* at 607. Moreover, the Court noted that were the federal standards to impose such duty, it would "intricately" involve the insurer in the day-to-day personnel decisions of its insureds and the additional manpower required of insurance companies to accomplish this task would be astronomical and the cost to the insureds prohibitive. *Id.* at 607 fn. 1. The second issue exclusively turned on the status of "negligent inspection" claims under Georgia law. *Id.* at 608.

Unlike the situation in *Kennedy*, the Federal Regulations at issue in this case do not concern how a motor carrier chooses to operate the specifics of its transportation business on a day to day basis. Instead, the Federal Regulations specifically control insurance policies covering interstate motor carriers and they specifically mandate that a MCS-90 endorsement **be issued by the insurer** and be contained in any policy of insurance covering an interstate motor carrier. The regulations also clearly set forth the **only way such mandated endorsement can be cancelled or terminated by an insurance company**. The regulations at issue in this case specifically create obligations and duties for an insurance company who insures a motor carrier and are specifically intended to not only control the insurer's behavior but they even dictate the actual coverage provided by the insurer's policy. Not only does the *Kennedy* decision fail to answer the issue presently before this Court, it addresses distinct regulations that, unlike the instant regulations, do not concern insurers or their policies covering motor carriers. Likewise, Plaintiff's current argument does not require Progressive to undertake any duty or action other than what is specifically required by the Federal Regulations. Accordingly, *Kennedy* should not be afforded any persuasive weight in determining the instant issue.

As Defendant acknowledges, the Eleventh Circuit Court of Appeals has not addressed the issue presented by this case; and, in fact, no Court in this Circuit has addressed this issue. Accordingly, the analyses of other Circuit Courts and other District Courts which have addressed this issue and similar issues are instructive.

D. The Majority of Circuit Courts of Appeals and District Courts Have Rejected The Defendant's Argument that Failing To Follow the Federal

Regulations to the Letter Should Absolve An Insurance Company From The Duties and Obligations Created By Those Very Same Regulations Specifically Designed to Protect the Public.

The majority of decisions from other Circuit Courts and other District Courts addressing the specific issue presented in this case and other similar issues have firmly held that a party's failure to comply with the Federal Regulations governing motor carriers does not absolve those parties or their insurers from the obligations they would otherwise been required to follow had the Federal Regulations been initially followed as mandated by Federal law. Each of these decisions is predicated on the courts' understanding that the primary purpose of the Federal Regulations that must be forwarded is the protection of the public. *See e.g., Travelers Ins. Co. v. Transport Ins. Co., 787 F.2d 1133, 1140 (7th Cir. 1986)*("The purpose of the federal statute and regulations is to ensure that an ICC carrier has independent financial responsibility to pay for losses sustained by the general public arising out of its truck operations). Given the specific purpose of protecting the public, the "majority view" has often held that "I.C.C. public policy factors are frequently **determinative where protection of a member of the public is at stake** . . . ." *Id.* (citations omitted). In other words, in performing any legal analysis regarding these Federal Regulations, they should be interpreted and applied in a manner where the public is financially protected from the negligence of motor carriers, as intended.

The exact argument made by the Defendant in this case was explicitly rejected by the Sixth Circuit in *Kline v. Gulf Ins. Co.*, *466 F.3d 450 (7th Cir. 2006).* In *Kline*, there was a factual dispute as to whether a MCS-90 endorsement was actually attached to the insurance policy at issue issued by Gulf. *Id.* at 452.[4] Gulf made the same argument offered by the Defendant in this case, namely that the MCS-90 endorsement could not apply to the Gulf policy because the appropriate form "was not filed with the Department of Transportation." *Id.* at 452 fn. 3. The Sixth Circuit rejected this argument and "held that no authority supported the position that the failure of a party to 'submit endorsements to the government vitiates any coverage so provided.'" *Id.* In other words, the Court refused to allow a parties failure to comply with the specific requirements of the Federal Regulations to nullify those requirements or vitiate the coverage so provided for the protection of the public.[5]

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[4]It is worth noting that given the fact that the Defendant motor carrier was self-insured pursuant to Federal Law, there would have been no requirement for Gulf to issue a MCS-90 endorsement on its policy because the financial responsibility regulations were otherwise satisfied. Nonetheless, the Court carefully considered this issue to make sure the injured motorist would be

The instant issue was also addressed by the Seventh Circuit in *Travelers Ins. Co. v. Transport Ins. Co.*, 787 F.2d 1133 (7th Cir. 1986). In *Travelers*, the Court was asked to determine which of three available insurance policies should provide primary coverage for liability arising out of a collision between a covered tractor-trailer and an automobile. *Id.* at 1134. One of the available policies was issued by Transport Insurance Co. The two other insurance companies argued that the Transport policy should provide primary coverage under the Federal Regulations because the MCS-90 endorsement on that policy would nullify any limitations in the policy regarding coverage. While the Court noted that "[t]he Transport policy did not contain a printed endorsement to this effect," it also noted that "it has been held that this endorsement [the equivalent of a MCS-90 endorsement] may be read into a policy certified to the ICC as a matter of law." *Id.* at 1139. In other words, the Court reasoned that the failure of the insurance policy to have a printed endorsement actually attached to it was not determinative of whether the policy would be found the contain the mandated endorsement, and, in fact, the

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fully compensated from the negligence of the motor carrier as required by Federal law.

[5] It is also worth noting that the remainder of the *Kline* Court's analysis turned on public policy considerations and making sure that the injured motorist received the protection intended by the Federal Regulations, specifically the minimum amount of coverage ensured by the MCS-90 endorsement provisions.

Court noted, to the contrary, that the endorsement would be read into the insurance policy as a matter of law. It is also worth noting that the analysis undertaken by the Seventh Circuit was based on the Court's understanding of the public policy behind the regulations and making sure that the injured member of the public was adequately protected as intended.

In support of this conclusion, the Seventh Circuit relied on the Tenth Circuit decision in *Hagans v. Glenn Falls Ins. Co., 465 F.2d 1249 (1972).* In *Hagans,* the Court was called upon to determine which of two available insurance policies would provide primary coverage for a wreck between a motor carrier and an automobile. While the Court pointed out that one of the polices at issue did not actually have an endorsement attached to it, it noted that the parties proceeded on the premise that the policy did provide coverage to an interstate motor carrier and that the policy did thus contain such endorsement as a matter of law. *Id.* at 1252.

Similarly, in *Prestige Casualty Co. v. Michigan Mutual Ins. Co.*, the Sixth Circuit was again called to determine the effect an ICC mandated endorsement would have on a policy of insurance where, in fact, the ICC endorsement was not attached to the actual policy. 99 F.3d 1340 (6th Cir. 1996). Even though it was clearly established that the ICC endorsement was not attached to the policy of insurance at issue, the Court and the insurance company issuing such policy acknowledged that the endorsement was "incorporated [into the policy] as a matter of law. *Id.* at 1348 fn. 6 (relying on *Travelers Ins. Co. v. Transport Ins. Co.,* 787 F.2d 1133, 1139 (7th Cir. 1986)*; Hagans v. Glens Falls Ins. Co.,* 465 F.2d 1249, 1252 (10th Cir. 1972)).

At the heart of each of these decisions is the realization that the federally mandated endorsements are specifically designed for the protection of the public and that a technical failure on the part of any party in executing or attaching the endorsement or sending the endorsement to the Government will not vitiate the coverage that is intended to be provided by the endorsement, which is mandated by law for the protection of the public. Operating on the principle that the regulations must be interpreted in such a way as to carry out their intended purpose, the Sixth, Seventh, and Tenth Circuit Courts of Appeals have refused to find that a party's failure to follow the strict requirements of the regulations regarding the handling or technical preparation or execution of the endorsement in some way nullifies the regulations or vitiates the coverage the regulations are intended to provide for the protection of the public.

In line with these decisions and this common rationale, other district court across the country have refused to hold that a parties failure to meet the specific requirements of the Federal regulations governing motor carriers somehow relieves the motor carrier or its insurer from the obligations set forth in the Federal regulations. *See e.g., Northland Ins. Co. v. New Hampshire Ins. Co., 63 F.Supp.2d 128 (D.N.H. 1999)*(finding MCS-90 endorsement was effective despite failure to attach endorsement to the policy); *Planet Ins. Co. v. Transport Indemnity Co.*, *823 F.2d 285, 287 (9th Cir. 1987)*(failure to comply with ICC regulations that requires display of placard does not relieve carrier from liability so long as vehicle is under control of carrier); *Kline v. Gulf Ins. Co.*, *98 Fed. Appx. 471, 475* (*6th Cir. 2004)*(finding that the failure of MCS-90 to be countersigned by a representative of the insurance company does not invalidate the endorsement).

In this case, Progressive issued a policy of insurance covering an authorized interstate motor carrier, Mel Miller d/b/a/ Fast Action Auto Transport. Because the policy covered an interstate motor carrier, Federal law mandated that the Progressive policy contain the MCS-90 endorsement. *Canal Ins. Co.*, 323 F.3d at 489. As this Court's sister court in the Northern District of Georgia has found, "insurance companies who insure vehicles owned or leased by interstate trucking companies **must include this endorsement in the policy**." *Kolenick*, 2006

WL 738715, at *3. By operation of law, the Progressive policy contained the required MCS-90 endorsement issued by Progressive, which was not canceled prior to the wreck at issue with Bobby Waters. Progressive is no stranger to the insurance industry and certainly understood that by choosing to insure a motor carrier it would be required to act as a suretyship for the protection of the public. As intended, the Federal Regulations must operate to ensure that Bobby Waters, an injured member of the driving public, be compensated for the injuries he sustained as a result of a motor carrier's negligence.

Pursuant to the regulations, Progressive will be required by Federal law to pay, within the limits of liability, any final judgment recovered against Defendant Miller. This will ensure that the Federal Regulations have accomplished their intended purposed – i.e., the protection of the innocent public. Progressive will have its financial interests protected by being allowed to recover any amount paid to Bobby Waters from Defendant Miller. This is exactly how the regulatory scheme was designed. The most important goal is ensure that injured members of the public are protected. Second, the financial interests of the insurer will be protected, leaving the negligent motor carrier ultimately responsible for his own negligence at the end of the day. Progressive issued a policy covering Defendant Miller, thereby becoming a suretyship for the protection of the public. Progressive should not be allowed to escape its clear obligations required by Federal law at the expense of Bobby Waters, an innocent member of the public whom the Federal Regulations at issue are specifically designed to protect.

The only case relied on by Defendant that addresses the issue before the Court is the Fifth Circuit's 2003 decision in *Illinois Central Railroad Co. v. Dupont*, 326 F.3d 665 (5th Cir. 2003).[6]

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[6] The District Court decisions relied upon by Defendant do not address the issue presently before the Court. *Brewer v. Maynard*, 2007 WL 2119250 (S.D.W.Va. 2007) addressed the question of whether an Insurer should be required to make sure that one of its insureds secures at least the required minimum amount of coverage under the Federal regulations for motor carriers.

In *Dupont*, the Fifth Circuit adopted the argument that the Sixth Circuit specifically refused to subsequently adopt in *Kline v. Gulf Ins. Co, infra.* The Fifth Circuit adopted the formalistic argument rejected by the above courts and found that the MCS-90 endorsement should not be read into a policy covering an interstate motor carrier as a matter of law because the Court reasoned the Federal Regulations only address motor carriers and not insurers. The Court also apparently analyzed this issue with its principle concern being the interests of the insurer.

In considering the authority from the Sixth, Seventh, and Tenth Circuit Courts of Appeals discussed above, it becomes clear that the Fifth Circuit's *Dupont* decision clearly represents the minority view and fails to forward the clear and specific purpose of the Federal Regulations at issue. Accordingly, this Court should follow the analyses of the Sixth, Seventh, and Tenth Circuits, whose sound decisions make sure that the Federal Regulations accomplish their specific purpose – the protection of innocent members of the public.

As discussed above, the specific Federal Regulations at issue in this case do specifically and directly impact insurers. As noted by the Northern District of Georgia, under the Federal Regulations at issue ***"insurance companies who insure vehicles owned or leased by interstate trucking companies must include this endorsement in the policy***." *Kolencik v. Progressive Preferred Ins. Co.*, 2006 WL 738715, *3 (N.D. Ga. 2006). The Federal Regulations also specifically control the coverage provided by the insurer's policy irrespective of the specific

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Unlike the situation here, the Court declined to impose such a duty on an insurer given that the decision as to the amount of monetary coverage was "a matter totally within the control of the insured." *Id* at *3. The issue involved in *Carolina Cas. Ins. Co. v. Zinsmaster*, 2007 WL 2006 (N.D. Ind. 2007) was whether the MCS-90 endorsement created a minimal protection for each person injured in a wreck with a motor carrier. The court concluded that an insurance company providing "an endorsement will not be liable for more than the security that is established by statute or by its insurance policy, if it provides for coverage above the statutory requirement." *Id.* at *5.

It is also worth noting that the *Zinsmaster* decision was certified for immediate appellate review by the Seventh Circuit.

terms or limitations in the policy. Lastly, the regulations specifically set forth the only way **an insurer** can terminate its obligations under the MCS-90 endorsement.

These specific regulations clearly impact and govern the actions of insurers and do not merely govern the behavior of motor carriers. If the Federal Regulations at issue can actually dictate and control the contractual terms of an insurance policy issued by an insurer, the required MCS-90 endorsement certainly can forseeably, reasonably and fairly be read into a policy of insurance covering an authorized motor carrier. In fact, the Progressive policy at issue contains similar provisions to the MCS-90 in its "Coverage Required By Filings" section, which states that Progressive has the right to seek reimbursement from Defendant Miller if it is required to make any payment as a result of any filings or certifications. Accordingly, the Fifth Circuit's rationale that the regulations are only directed to motor carriers rings hollow.

Secondly, the decisions from the Sixth, Seventh, and Tenth Circuits all have one common method of analysis and that is making sure the Federal Regulations at issue are interpreted in such a way as to forward the entire purpose behind the regulations, which is to make sure that injured members of the public, like Bobby Waters, are protected. In fact, the Seventh Circuit noted that the "majority view" has found that the regulations "public policy factors are frequently determinative where protection of a member of the public is at stake." *Travelers Ins. Co. v. Transport Ins. Co.,* 787 F.2d 1133, 1140 (7th Cir. 1986). In other words, the primary framework in addressing these issues should be to make sure that a member of the public receives the protection that is specifically intended by the Federal Regulations at issue.

That is not to say the financial interests of the insurer warrant no consideration. In fact, the Federal Regulations specifically protect the financial interests of the insurer by stating that the insured must reimburse the insurer for any payment made as a result of the MCS-90 endorsement that would otherwise not have been made pursuant to the actual policy of insurance. Accordingly, Progressive will have the opportunity to seek reimbursement from Mel Miller for any payment made to Bobby Waters. In doing so, the Federal Regulations clearly prioritize the competing financial interests between an injured member of the public and an insurer. Under this regulatory framework, the interests of the injured member of the public supersede that of the insurer. This only makes sense because that it is the entire reason the regulations were enacted.

Lastly, this Court should follow the rationale of the Sixth, Seventh and Tenth Circuits' and reject the Fifth Circuit's because adopting Defendant's argument would allow Defendant insurers and motor carriers, alike, to escape the obligations set forth in the Federal Regulations by simply choosing not to follow the Federal Regulations. One cannot not imagine a more perverse incentive. If one can escape the obligations of the regulations simply by ignoring them, then why would anyone ever follow the regulations. The Federal regulations would simply be neutered to the point of being voluntary suggestions. Certainly, when Congress and the Secretary of Transportation acted to specifically set forth regulations to ensure the public was protected from the negligence of motor carriers, they expected those regulations to be followed and to actually operate to protect the public.

E. Should the Court be Inclined to Grant Defendant's Motion For Summary Judgment on the Federal Law Aspects of the Coverage Issues Presented in this Case, Plaintiff Requests the Court Certify All of the Coverage Issues Raised in Plaintiff's Count for Declaratory Judgment for an Immediate Interlocutory Appeal Under 28 U.S.C. § 1292.

Under 28 U.S.C. § 1292, a district court can authorize a party to make an immediate appeal of any Order that would not otherwise be appealable at that time if such Order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation."

In the event the Court grants Defendant's Motion for Summary Judgment (which Plaintiff clearly contends should be denied for the reasons set forth above), Plaintiff requests that the Court state in its Order that issues presented and decided in the Order and the Court's prior Order of July 30, 2007 be certified for an immediate appeal to the Eleventh Circuit. Each of these Orders involve controlling questions of both Federal law and the law of the State of Florida. The Federal law issue has never been addressed by the Eleventh Circuit and there is split in authority of other Circuits who have addressed the particular and similar issues. Accordingly, there is substantial ground for difference of opinion. Lastly, because these issues determine who may be financially liable for the damages caused by the negligence of Defendant Miller and what financial resources may be available to cover any judgment rendered against Defendant Miller, the resolution of these issues is very likely to materially advance the ultimate termination of the litigation.

Similarly, the coverage issues raised under Florida law have not specifically been addressed by the Supreme Court of Florida and the existing law demonstrates that there is a substantial ground for difference of opinion on those issues. Likewise, any final resolution of those legal issues will likely materially advance the ultimate termination of this litigation.

In light of the foregoing, Plaintiff respectfully requests that in the event the Court grants Defendant's current Motion for Summary Judgement that the Court certify in such Order that it finds that the issues presented and resolved by that Order (Federal law coverage issue) and the Court's previous July 30, 2007 Order (Florida law coverage issue) "involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal from those Orders may materially advance the ultimate termination of the litigation."

CONCLUSION

WHEREFORE, Plaintiff's respectfully request that Defendants' Motion for Summary Judgement be denied.

Respectfully submitted this 17th day of October, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Memorandum of Law and Brief in Support of Plaintiff's Motion for Summary Judgment and Plaintiff's Response to Defendants' Motion for Summary Judgment was served via CM/ECF:

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This the 17th of October, 2007

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